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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE VINCE CHHABRIA

IN RE: FACEBOOK CONSUMER PRIVACY )  
USER PROFILE LITIGATION, )  
 ) NO. 18-MD-2843 VC  
 )  
 ) SAN FRANCISCO, CALIFORNIA  
 ) NOVEMBER 15, 2018

**TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND**

**RECORDING 9:07 A.M. - 9:19 A.M.**

**APPEARANCES:**

**FOR PLAINTIFFS**

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(FURTHER APPEARANCES ON FOLLOWING PAGE)

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RETIRED OFFICIAL COURT REPORTER, USDC**

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**BY: JOSHUA S. LIPSHUTZ, ESQUIRE  
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**FOR ROBERT MERCER**

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**BY: MARK C. HANSEN, ESQUIRE  
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1 THURSDAY, NOVEMBER 15, 2018

9:07 A.M.

2 (TRANSCRIBER'S NOTE: DUE AT TIMES TO COUNSELS' FAILURE TO  
3 IDENTIFY THEMSELVES WHEN SPEAKING, CERTAIN SPEAKER  
4 ATTRIBUTIONS ARE BASED ON EDUCATED GUESS.)

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6 PROCEEDINGS

7 **THE CLERK:** CALLING CASE NO. 18-MD-2843, IN RE  
8 FACEBOOK, INC., CONSUMER PRIVACY USER PROFILE LITIGATION.

9 COUNSEL FOR PLAINTIFFS PLEASE STATE YOUR APPEARANCES  
10 FOR THE RECORD.

11 **MR. LOESER:** DEREK LOESER FROM KELLER ROHRBACK FOR  
12 THE PLAINTIFFS, AND WITH ME IS MY COLLEAGUE CARI LAUFENBERG.

13 **MS. WEAVER:** HI. THIS IS LESLEY WEAVER OF BLEICHMAR  
14 FONTI AULD FOR THE PLAINTIFFS.

15 **THE CLERK:** AND FOR DEFENDANT FACEBOOK?

16 **MR. LIPSHUTZ:** HI. THIS IS JOSHUA LIPSHUTZ FOR  
17 FACEBOOK, AND WITH ME IS MY COLLEAGUE CHRISTOPHER LEACH.

18 **THE CLERK:** AND FOR DEFENDANT MERCER?

19 **MR. HANSEN:** GOOD MORNING, YOUR HONOR. THIS IS MARK  
20 HANSEN FOR MR. MERCER. WITH ME ARE MY COLLEAGUES AARON PANNER,  
21 JAKE HARTMAN AND CHRIS SARMA.

22 **THE COURT:** OKAY. GOOD MORNING.

23 SO YOU GOT MY ORDER. I THOUGHT THAT WHAT YOU  
24 PROPOSED IN TERMS OF WHAT YOU REFERRED TO AS THE  
25 NON-PRIORITIZED CLAIMS MADE PERFECT SENSE.

1 AS TO DEFENDANTS WHO YOU'VE LABELED AS  
2 NON-PRIORITIZED DEFENDANTS, I THOUGHT, AS A MATTER OF FAIRNESS,  
3 IF A DEFENDANT HAS BEEN NAMED IN THIS LITIGATION AND BELIEVES  
4 THEY SHOULD NOT BE A DEFENDANT AND WANTS TO TRY TO GET OUT,  
5 THEY SHOULD HAVE THE RIGHT TO TRY TO GO OUT SOONER RATHER THAN,  
6 YOU KNOW, IN SEVERAL YEARS OR WHATEVER.

7 SO THAT I THINK DIS- -- THAT -- WE NOW HAVE A PLAN  
8 FOR HOW WE'RE GOING TO HANDLE MR. MERCER. AND THEN THE  
9 QUESTION REMAINS HOW DO WE HANDLE BANNON AND KOGAN? I  
10 BELIEVE -- I BELIEVE I HEARD THAT THE PROOF OF SERVICE WAS  
11 FILED FOR KOGAN YESTERDAY; IS THAT RIGHT?

12 **MR. LOESER:** THAT'S CORRECT, YOUR HONOR.

13 **THE COURT:** OKAY. SO WHAT'S -- FIRST OF ALL, LET ME  
14 ASK WITH -- AND HAS BANNON BEEN SERVED?

15 **MR. LOESER:** BANNON HAS BEEN SERVED, THOUGH, AS OF  
16 THE CASE WITH KOGAN, IT WAS NOT EASY AND IT REQUIRED, YOU KNOW,  
17 CAREFUL LOOK AT THE WAYS YOU NEED TO SERVE PEOPLE IN THESE  
18 DIFFERENT JURISDICTIONS WHEN THEY'RE NOT MAKING THEMSELVES  
19 AVAILABLE FOR IN-PERSON TYPE SERVICE.

20 SO HE HAS NOW BEEN SERVED, ACCORDING TO D.C. SUPERIOR  
21 COURT RULES, BY MAIL AND ANOTHER MEANS, APPARENTLY, BY SERVICE  
22 ON HIS FATHER. WHETHER HE WILL RESPOND OR APPEAR, WE DON'T  
23 KNOW, BUT SERVICE HAS BEEN EFFECTED.

24 **THE COURT:** OKAY. AND SO -- SO WHAT -- SO LET ME  
25 ASK, GOING BACK TO MERCER FOR A MOMENT, WHAT'S -- IS THE PLAN

1 STILL THAT WE WOULD CONSIDER MR. MERCER'S MOTION TO DISMISS  
2 OR -- I MEAN, I THINK I FLOATED THE POSSIBILITY OF A DISMISSAL  
3 WITHOUT PREJUDICE AND ALONG WITH A TOLLING AGREEMENT. HAVE YOU  
4 ALL DISCUSSED THAT?

5 **MR. LOESER:** WE HAVE RAISED THAT WITH MR. MERCER'S  
6 COUNSEL. WE OFFERED TO DISMISS WITHOUT PREJUDICE WITH A  
7 TOLLING AGREEMENT. THE WITHOUT PREJUDICE PART WAS ACCEPTABLE.  
8 THE TOLLING AGREEMENT WAS NOT. AND SO WE NEED TO DECIDE,  
9 FRANKLY, WHETHER WE'RE GOING TO PROCEED TO JUST HAVE THE  
10 MOTIONS BRIEFED AND DECIDED OR IF WE'D CONSIDER DISMISSING  
11 WITHOUT A TOLLING AGREEMENT.

12 FRANKLY, I THINK IT'S AT THIS POINT PROBABLY MORE  
13 LIKELY THAT THE BRIEFING WOULD CONTINUE, THOUGH WE WOULD PREFER  
14 THAT IT BE STAGGERED A BIT SO IT'S NOT AT THE EXACT SAME TIME  
15 AS THE MAIN FACEBOOK MOTION.

16 **THE COURT:** WELL, I -- I GUESS LET ME ASK --

17 **MR. HANSEN:** YOUR HONOR --

18 **THE COURT:** LET ME ASK MR. HANSEN. I MEAN, IS  
19 THERE -- WHY WOULDN'T -- I MEAN, I'M TRYING TO UNDERSTAND WHY  
20 IT WOULD NOT BE IN YOUR CLIENT'S INTEREST TO DISMISS WITHOUT  
21 PREJUDICE AND WITH TOLLING AGREEMENT? I MEAN, IT SEEMS TO ME  
22 THAT IF YOUR CLIENT IS INTERESTED IN SAVING MONEY, YOU KNOW,  
23 THERE'S PROBABLY A PRETTY STRONG LIKELIHOOD THAT IF YOUR CLIENT  
24 IS DISMISSED WITHOUT PREJUDICE AND WITH A TOLLING AGREEMENT  
25 NOW, YOUR CLIENT WILL NEVER HAVE TO DEFEND HIMSELF IN THIS

1 CASE. SO WHY WOULDN'T YOU -- WHY WOULDN'T YOU GO WITH THAT  
2 OPTION?

3 **MR. HANSEN:** THANK YOU, YOUR HONOR.

4 IT'S CERTAINLY TRUE WE WOULD ACCEPT DISMISSAL, BUT WE  
5 DON'T WANT TO GIVE UP MR. MERCER'S SUBSTANTIVE RIGHTS HERE. WE  
6 THINK SOME OF THE CLAIMS HAVE ALREADY EXPIRED, AND FACEBOOK HAS  
7 BRIEFED THAT IN ITS MOTION. AND FRANKLY WE THINK --

8 **THE COURT:** BUT WHICH SUBSTANTIVE -- WHICH  
9 SUBSTANTIVE RIGHTS WOULD YOU BE GIVING UP IF YOU AGREED TO A  
10 DISMISSAL OF THE CASE WITHOUT PREJUDICE AND WITH A TOLLING  
11 AGREEMENT?

12 **MR. HANSEN:** WELL, YOUR HONOR, THE RIGHT TO BASICALLY  
13 BE -- UNDER THE CALIFORNIA LAWS TO HAVE THE STATUTES RUN AS  
14 PROVIDED BY LAW. WE THINK THAT EVERY LITIGANT IN EVERY ONE OF  
15 THESE CASES -- YOU EITHER SUE SOMEBODY, OR YOU'RE AT RISK OF  
16 HAVING YOUR CLAIM EXPIRE UNDER THE (INDISCERNIBLE) STATUTE OF  
17 LIMITATIONS. WHEN YOU TOLL --

18 **THE COURT:** I UNDERSTAND, BUT I'M ASKING A DIFFERENT  
19 QUESTION, WHICH IS -- LET ME ASK YOU THIS, IS YOUR CLIENT ON  
20 THE PHONE RIGHT NOW?

21 **MR. HANSEN:** CLIENT IS NOT, YOUR HONOR.

22 **THE COURT:** OKAY. BECAUSE MY QUESTION TO YOUR CLIENT  
23 WOULD BE: IF YOU HAVE AN OPTION OF A DISMISSAL WITHOUT  
24 PREJUDICE AND A TOLLING AGREEMENT, WHY WOULD YOU NOT TAKE THAT?  
25 BECAUSE IT MEANS THAT YOU WILL NOT LIKELY NOT HAVE TO PAY YOUR

1 LAWYER ANY MORE MONEY EVER, BUT IF YOU REFUSE THAT, IT MEANS  
2 THAT YOU WILL LIKELY HAVE TO PAY YOUR LAWYER A LOT MORE MONEY  
3 TO LITIGATE A MOTION TO DISMISS.

4 SO IT KIND OF SOUNDS LIKE IT'S CONTRARY TO THE  
5 INTERESTS OF YOUR CLIENT. PERHAPS IT'S IN THE INTEREST OF YOUR  
6 CLIENT'S LAWYER. BUT IT SOUNDS LIKE IT'S POTENTIALLY CONTRARY  
7 TO THE INTERESTS OF YOUR CLIENT TO REFUSE TO REFUSE TO ACCEPT A  
8 DISMISSAL WITHOUT PREJUDICE ALONG WITH A TOLLING AGREEMENT.

9 I MEAN, OBVIOUSLY, IT'S UP TO YOUR CLIENT, BUT I'M  
10 JUST TRYING TO GET AN UNDERSTANDING. I MEAN, YOUR RESPONSE TO  
11 ME IS, WELL, WE WANT TO PRESERVE -- I WANT TO PRESERVE MY  
12 CLIENT'S SUBSTANTIVE RIGHTS. I DON'T KNOW WHAT THAT MEANS.  
13 THE QUESTION I'M ASKING YOU IS: WHY IS IT IN YOUR CLIENT'S  
14 INTEREST TO SPEND MONEY ON LITIGATION RIGHT NOW WHERE A  
15 DISMISSAL WITHOUT PREJUDICE AND WITH A TOLLING AGREEMENT WOULD  
16 VERY LIKELY RESULT IN YOUR CLIENT NEVER HAVING TO SPEND MONEY  
17 ON THE LITIGATION, BECAUSE YOUR CLIENT VERY LIKELY WILL NEVER  
18 BE BROUGHT BACK INTO THE CASE?

19 **MR. HANSEN:** IF I COULD ANSWER, YOUR HONOR?

20 **THE COURT:** GO AHEAD.

21 **MR. HANSEN:** FIRST OF ALL, I DON'T WANT TO ENGAGE IN  
22 GUESSWORK AS TO WHETHER THEY WILL OR WON'T TRY TO BRING US BACK  
23 INTO THE CASE. WE HAVE NO GUARANTEE OF THAT. AND IF WE SIGN A  
24 TOLLING AGREEMENT, TWO YEARS HENCE WE COULD BE FINDING  
25 OURSELVES IN THE SAME POSTURE AND WE WILL HAVE GIVEN UP OUR

1 RIGHT TO SAY THE STATUTE HAS EXPIRED.

2 YOU'RE RIGHT, YOUR HONOR. AS WE SIT HERE TODAY, WE  
3 ARE PREPARED AND WE'RE READY WILLING AND ABLE TO ARGUE OUR  
4 TEN-PAGE MOTION TO DISMISS, WHICH IS PROBABLY ONE OF THE  
5 SHORTER, MORE CONCISE MOTIONS TO DISMISS I'VE EVER FILED IN MY  
6 CAREER.

7 I DON'T WANT TO BE OVERCONFIDENT, BUT WE FEEL VERY  
8 STRONGLY THAT MR. MERCER IS GOING TO BE DISMISSED IN THIS CASE  
9 AND THAT IT'S IN HIS INTERESTS TO BE DISMISSED IN THE CASE,  
10 RATHER THAN GIVE UP HIS RIGHT UNDER THE STATUTE.

11 AND, FINALLY, YOUR HONOR, I WILL TELL YOU THAT  
12 MR. MERCER, APPRISED OF ALL THESE CONCERNS AND CONSIDERATIONS  
13 AND HAVING READ YOUR ORDER, HAS SO INSTRUCTED US. SO IT'S NOT  
14 A MATTER OF THE LAWYERS MAKING THE DECISION HERE. MR. MERCER  
15 HERE HAS MADE THE DECISION. HE WOULD PREFER TO PUT PLAINTIFFS  
16 TO THE ACTUAL CHOICE THEY SHOULD FACE UNDER THE FEDERAL RULES,  
17 WHICH IS SUE HIM AND PURSUE YOUR CLAIM OR DROP HIM, AND HE  
18 SHOULDN'T HAVE TO AGREE TO SOME KIND OF WEIRD INTERMEDIATE  
19 STATUS NOT PROVIDED IN THE FEDERAL RULES AS THE PRICE FOR  
20 HAVING HIS RIGHTS VINDICATED. I THINK THAT'S THE WAY  
21 MR. MERCER SEES IT.

22 AND SO IT'S TRUE, SOMEONE WILL HAVE TO GET ON AN  
23 AIRPLANE AND GO ARGUE THIS MOTION. IT'S ALREADY BRIEFED FROM  
24 US, WITH THE EXCEPTION OF A VERY SHORT REPLY, AND THAT WILL  
25 COST (INDISCERNIBLE) MONEY.



1 I SHOULD SAY PARENTHETICALLY, YOUR HONOR, I WANTED TO  
2 START OFF BY THANKING YOU FOR HOLDING THIS HEARING BY  
3 TELEPHONE, BECAUSE THAT DID, INDEED, SAVE MR. MERCER  
4 SUBSTANTIAL EXPENSE AND SAVED US FROM HAVING TO MAKE THE TRIP.  
5 SO I WANTED TO MAKE SURE I THANK THE COURT FOR THAT  
6 ACCOMMODATION.

7 BUT I DO THINK, YOU KNOW, RATIONALLY, IN THE POSITION  
8 OF MR. MERCER IT MAKES SENSE TO CALL THE QUESTION NOW, RATHER  
9 THAN GIVE US HIS RIGHTS UNDER THE STATUTE OF LIMITATIONS, WHICH  
10 ARE QUITE SHORT IN THIS CASE. SOME OF THEM ARE YEAR LONG  
11 STATUTES, AND AS FACEBOOK HAS QUITE PERSUASIVELY ARGUED, MANY  
12 OF THEM HAVE BLOWN BEFORE THE PLAINTIFFS HAVE EVER FILED THEIR  
13 CASE.

14 I DON'T WANT TO BE IN A POSITION FOR REVIVING CLAIMS.  
15 I DON'T WANT TO BE IN A POSITION OF ALLOWING THE PLAINTIFFS A  
16 FREE SHOT TWO YEARS HENCE OR THREE YEARS HENCE. WE THINK WE  
17 HAVE A VERY MERITORIOUS SIMPLE MOTION TO DISMISS. IT'S BEEN  
18 BRIEFED.

19 AND IT'S TRUE, A CERTAIN AMOUNT OF ADDITIONAL EXPENSE  
20 WILL BE INCURRED IN GETTING DONE, BUT THAT'S THE ACTUAL  
21 DECISION MR. MERCER HAS MADE. IN SO DOING I THINK HE'S RELYING  
22 ON RIGHTS THAT ARE EXPRESSLY PROVIDED TO HIM IN THE FEDERAL  
23 RULES.

24 AS WE BRIEFED IN THE MOTION TO STAY ARGUMENT, THERE'S  
25 SIMPLY NO SUPPORT WHATSOEVER FOR TAKING SOMEONE WHO'S A

1 DEFENDANT IN A FEDERAL LAWSUIT AND PUTTING HIM IN SOME KIND OF  
2 LIMBO STATUS BECAUSE PLAINTIFFS' COUNSEL CAN'T AGREE WHETHER TO  
3 PURSUE CLAIMS OR NOT. WE DON'T WANT TO GIVE THEM THE FREE  
4 OPTION OF JUST PUTTING MR. MERCERS IN THE ICEBOX AND BRINGING  
5 HIM OUT WHENEVER THEY WANT TO DO THAT TWO YEARS HENCE.

6 SO SORRY FOR THE LONG ANSWER, YOUR HONOR.

7 **THE COURT:** A DISMISSAL WITHOUT PREJUDICE IS HARDLY  
8 PUTTING HIM IN THE ICEBOX. BUT, IN ANY EVENT, YOUR POSITION  
9 HAS BEEN MADE CLEAR.

10 SO THEN WHAT ARE WE -- MR. LOESER, WITH RESPECT TO  
11 BANNON AND KOGAN, I MEAN, IS THE ANSWER THAT WE JUST NEED TO  
12 WAIT AND SEE IF THEY ANSWER OR OTHERWISE RESPOND TO THE  
13 CONSOLIDATED COMPLAINT? AND THEN IF THEY DON'T, PRESUMABLY,  
14 DEFAULT WILL BE ENTERED, AND THEN WE CAN DEAL WITH A MOTION FOR  
15 DEFAULT JUDGMENT AT SOME LATER TIME? AND IF THEY DO ANSWER OR  
16 OTHERWISE RESPOND TO THE COMPLAINT, THEN YOU NEED TO MAKE THE  
17 SAME DECISION WITH RESPECT TO THOSE DEFENDANTS AND HAVE THE  
18 SAME CONVERSATIONS WITH THOSE DEFENDANTS AS YOU'VE HAD WITH  
19 MR. MERCER'S COUNSEL. DOES THAT SOUND RIGHT?

20 **MR. LOESER:** THAT DOES SOUND RIGHT, YOUR HONOR.  
21 THAT'S EXACTLY WHAT WE INTEND TO DO.

22 **THE COURT:** OKAY. SO IS THERE ANYTHING FURTHER FOR  
23 US TO DISCUSS AT THE MOMENT?

24 **MR. LOESER:** NO, THERE'S NOTHING, I WOULD SAY RIPE  
25 FOR CONSIDERATION. I WILL TELL YOU THAT COMING DOWN THE PIKE,

1 YOU HAD ENTERED AN ORDER ON CERTAIN DISCOVERY FROM FACEBOOK,  
2 AND WE CONTINUE TO MEET AND CONFER WITH FACEBOOK ON THEIR  
3 RESPONSES. I'M HOPING THAT WE CAN RESOLVE THE DISPUTES WE HAVE  
4 ABOUT THE EXTENT TO WHICH THEY'VE COMPLIED WITH YOUR ORDER,  
5 AND, HOPEFULLY, THAT JUST RESOLVES ITSELF THROUGH THE  
6 NEGOTIATIONS THAT ARE CONTINUING, BUT, IF NOT, IT'S SOMETHING  
7 WE MAY NEED TO RAISE IN THE NEAR FUTURE.

8 **THE COURT:** I'M HERE AND HAPPY TO HELP YOU RESOLVE  
9 ANY DISPUTE. THE ONLY THING I WILL SAY IS THAT I WOULD  
10 STRONGLY PREFER THAT YOU NOT -- THAT HIS -- YOU KNOW, ANY  
11 DISAGREEMENT THAT YOU HAVE ABOUT DISCOVERY NOT BE A REASON TO  
12 CONTINUE THE HEARING ON THE MOTION TO DISMISS. SO IF -- YOU  
13 KNOW, YOU SHOULD TEE UP THE DISPUTE WITH ME LONG BEFORE THERE'S  
14 A RISK OF THE DISPUTE INTERFERING WITH THE SCHEDULE THAT WE'VE  
15 SET.

16 **MR. HANSEN:** UNDERSTOOD, YOUR HONOR.

17 **MR. LOESER:** UNDERSTOOD.

18 **THE COURT:** OKAY. VERY GOOD. THANK YOU FOR CALLING.  
19 TALK TO YOU SOON.

20 (PROCEEDINGS ADJOURNED AT 9:19 A.M.)  
21  
22  
23  
24  
25

CERTIFICATE OF TRANSCRIBER

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT  
TRANSCRIPT, TO THE BEST OF MY ABILITY, OF THE ABOVE PAGES OF  
THE OFFICIAL ELECTRONIC SOUND RECORDING PROVIDED TO ME BY THE  
U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, OF THE  
PROCEEDINGS TAKEN ON THE DATE AND TIME PREVIOUSLY STATED IN THE  
ABOVE MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR,  
RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN  
WHICH THIS HEARING WAS TAKEN; AND, FURTHER, THAT I AM NOT  
FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE  
ACTION.



JOAN MARIE COLUMBINI

TUESDAY, NOVEMBER 20, 2018